IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SALES TAX REFERENCE NO.14 OF 1995
IN
REFERENCE APPLICATION NO.58 OF 1992

The Commissioner of Sales Tax,
Maharashtra State, Bombay
having his office at 8th floor,
Vikrikar Bhavan, Mazgaon,
Bombay-400 010 ..Applicant.

V/s.

M/s. B.M.Shah and Company
having their place of business
at 40 Shamaldas Gandhi Marg,
Bombay 400 002 ..Respondent.

Mr.Shekhar Naphade, Sr.Counsel with Mrs.Madhubala Kajle for the Applicant.
Mr.P.V.Surte i/b M/s. P.V.Surte & Co. for the Respondent.

SALES TAX REFERENCE NO.4 OF 2000
IN
REFERENCE APPLICATION NO.5 & 6 OF 1995

The Commissioner of Sales Tax,
Maharashtra State, Mumbai
having his office at 8th floor,
Vikrikar Bhavan, Mazgaon,
Bombay 400 010 ...Applicant.

V/s.

M/s. Crystaline Corporation
having their place of business
at 212, Tulsiani Chambers,
Nariman Point,
Bombay 400 021 ...Respondent.

Mr.Shekhar Naphade, Senior Counsel with Mrs. Madhubala Kajle for the Applicant.
Mr.P.V.Surte i/b P.V.Surte & Co.for the Respondent.

ALONGWITH
SALES TAX REFERENCE NO.11 OF 2000
IN
REFERENCE APPLICATION NO.41 OF 1993

The Commissioner of Sales Tax,
Maharashtra State, Mumbai
having his office at 8th floor,
Vikrikar Bhavan, Mazgaon,
Bombay- 400 002 ..Applicant.

V/s.

M/s.K.Mohan & Co. (Exports)
having their place of business
at 54-D, Nariman Bhavan,
Bombay- 400 021. ..Respondent.

Mr.Shekhar Naphade, Sr.Counsel with Mrs.Madhubala Kajle for the Applicant.
None for the Respondent.

ALONGWITH
SALES TAX REFERENCE NO.12 OF 2000
IN
REFERENCE APPLICATION NO.13 & 14 OF 1993

The Commissioner of Sales Tax,
Maharashtra State Mumbai,
having his office at 8th floor,
Vikrikar Bhavan, Mazgaon,
Bombay- 400 010 ..Applicant.

V/s.

M/s.G.Rasul & Co.
having their place of business
at 31/34, Sherif Devji Street,
Bombay- 400 003. ..Respondent.

Mr.Shekhar Naphade, Sr.Counsel with Mrs.Madhubala Kajle for the Applicant.
None for the Respondent.

ALONGWITH
SALES TAX REFERENCE NO.8 OF 2001
IN
REFERENCE APPLICATION NO.23 OF 1995

The Commissioner of Sales Tax
Maharashtra State, Mumbai
having his office at
Vikrikar Bhavan,
8th floor, Mazgaon,
Mumbai- 400 010 ...Applicant

V/s.

M/s. Ashapura Minechem Pvt.Ltd.
having its place of business at
Jeevan Udyog Bldg., 3rd floor,
278, D.N.Road, Fort,
Mumbai- 400 001. ...Respondent.

Mr.Shekhar Naphade, Senior Counsel
with Mrs.Madhubala Kajle for the Applicant.
Mrs.N.R.Badeka with Mr.B.C.Joshi with
Mr.R.A.Naik for the Respondent.

CORAM: Dr.S.RADHAKRISHNAN &
J.H.BHATIA, JJ.
DATE : 22nd July, 2005.

ORAL JUDGMENT: (Per S.Radhakrishnan, J.)

1. In all the above References following common questions of law have been referred:

> 1."Whether on the facts and in the circumstances of the case and on the true and correct interpretation of section 2(4) of the Sale of Goods Act, was the Maharashtra Sales Tax Tribunal justified in law in holding that delivery orders issued by bankers to the respondents in pursuance of Airways bills are documents of title to the goods, which are also negotiable ?"
>
> 2."Whether on the facts and in the circumstances of the case and on a true and correct interpretation of section 5(2) of the Central Act, 56, was the Tribunal justified in law in holding that the disputed transaction under sale invoice No.16 dt.9.4.1987 was allowable under section 5(2) of Central Sales Tax Act, 1956 on the ground that sales are effected by transfer of documents of title to the goods before the goods had crossed the customs frontier of

India"?

2. To decide the above questions of law raised hereinabove, following provisions of law will be relevant. Section 2(4) of the Sale of Goods Act defines "document of title to the goods".

> "document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, (multimodal transpart document,) warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented";

3. Section 4 of the Sale of Goods Act defines what is the sale and agreement to sale.

> " Sale and agreement to sell.-(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property

> in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred".

4. Section 5(2) of the Central Sales Tax Act, 1956 would also be relevant as all the above 5 References are concerned, that sale taking place during the course of import under section 5(2) of the Central Sales Tax Act, 1956.

> " A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India".

I. Sales Tax Reference No.14 of 1995.

5. The brief facts of the case involved in the **Commissioner of Sales Tax Act v. B.M.Shah And Company**, are the Respondent, B.M.Shah And Company is a registered dealer under the Bombay Sales Tax Act, 1959 (hereinafter referred to as "Act") as well as the Central Sales Tax Act, 1956 (hereinafter referred to as "Central Act") respectively. The Respondents were importers of drugs and laboratory chemicals and possessed REP Import Licences. The goods so imported were to be sold to actual users within the State of Maharashtra or outside the State of Maharashtra.

6. The Respondents in order to facilitate import of goods from foreign exporters, had opened the Letter of Credit dated 11th September, 1980 with the Grindlays Bank Limited, Bombay. Then, they placed purchase orders through Messers J.R.Sharma & Company to PLIVA Pharmaceutical, Chemical, Food and Cosmetic Industry, Zagrab, Yugoslavia, to despatch 100 drums of Ocytetracycline Hydrochloride vide Sales Invoice dated 15th October, 1980. At that time, the Bill of Exchange dated 15th October, 1980 was also drawn on Grindlays Bank Limited, Bombay and the copy is endorsed to the Respondents. The goods were then despatched by air through Jugo Transport, Zagrab, and in due course, Airway Bill dated 15th October, 1980 was received by the Bank and a copy of the same was also received by the Respondent. Thereafter, on 12th November, 1980, the Respondent had written to the Assistant Collector of Customs, declaring sales of consignments to different parties on **"highsea sales basis"**. The goods were then despatched by Air India and the Respondent was informed of the cargo arrival, directing them to contact their agents, M/s.Airfreight (P) Ltd. for delivery thereof. The Respondent deposited the price of the goods with the Grindlays Bank Ltd. and thereafter, on 14th November, 1990, letters were issued by the Bank addressed to

Airfreight Private Limited instructing them to deliver the goods to the Respondent or order against payment of customs duty and all charges. The Respondent had endorsed these letters in favour of their customers who had got their respective goods cleared on payment of customs duty and other charges. Thus, the Respondent sold all the 100 drums to their customers.

7. .It was the case of the Respondent before the Sales Tax Officer that they have sold the goods by transfer of document of title to the goods before goods had crossed the customs frontiers of India and the said transactions are not assessable under section 5(2) of the Central Sales Tax Act. The Sales Tax Officer rejected the contention of the Respondent and held that the Delivery Order could be legally issued by Airfreight Private Limited and the letter issued by the Grindlays Bank was not a document of title to the goods and the transaction was not a sale and as contemplated under section 5(2) of the Central Act. Being aggrieved by this order of the Sales Tax Officer, the Respondent preferred an Appeal before Assistant Commissioner of Sales Tax (Appeals) who held that sales being in the course of import was exempted from the tax. The Commissioner of Sales (Administration) III,under revisional jurisdiction passed an order under section 57 of the said Act and

held that the letter issued by the Bank was not a Delivery order but "no dues certificate". He has also held that the goods were not ascertained and the sale thereof could not be effected and to more than already of splits. The order of the Sales Tax Officer was upheld and the order of the Assistant Commissioner (Appeals) was set aside. Aggrieved thereby, the Respondent went in appeal to the Tribunal which held that the letter issued by the Grindlays Bank was a Delivery Order that is, a document of title to the goods in favour of the Respondent and the sale had taken place before crossing the customs barrier of India.

II. Sales Tax Reference No.4 of 2000.

8. The brief facts in the case of Commissioner of Sales Tax v. Crystaline Corporation are that the Respondent, M/s. Crystaline Corporation is a registered dealer and that it manufactures ready-made garments. They are also importers of chemicals, C.R.Sheets, Generators, picture tubes, etc. For the year 1983-84, the Sales Tax Officer disallowed the claim of the Respondent under section 5(2) of the Central Act and raised the payment of Rs.3,73,423/-. Aggrieved by the said assessment, the Respondent filed an Appeal before the learned Assistant Commissioner (Appeals) who by an order dated 2nd

September, 1987 partly allowed the Appeal and reduced the tax amount by Rs.14,332/-. Being dissatisfied, the Respondent filed Second Appeal before the Deputy Commissioner of Sales Tax (Appeals) who held that the delivery orders issued by the Canara Bank can be taken as a document of title to the goods and accordingly, allowed the Appeal. The Additional Commissioner of Sales Tax reversed the above order on the ground that the delivery order is not a document of title to the goods. The Respondent filed an Appeal to the Maharashtra Sales Tax Tribunal who held that the Delivery Order issued by the Canara Bank is a document of title to the goods which is negotiable, and when it was endorsed by the importer in favour of the purchasing dealer.

III.The Sales Tax Reference No.11 of 2000

9. In the **Commissioner of Sales Tax v. K.Mohan & Co.** case , the Respondents are registered dealers. They are exporters in ready-made garments and importers in machines, cloth, chemical, etc. They have opened the Letter of Credit with the State Bank of India, Bombay to facilitate import of goods from foreign exporters. The Respondent had contended that the goods were sold by

transfer of document of title to the goods before the goods had crossed the customs frontiers of India, and therefore, they are exempted from tax under section 5(2) of the Central Act. The Assistant Commissioner of Sales Tax held that the Respondents themselves taken the possession of the consignment and the letter issued by the State Bank of India, was not a document of title and nor a Delivery Order.

10. The Respondent preferred an Appeal before the Deputy Commissioner Sales Tax, Bombay, who agreed with the same and held that the letter issued by the State Bank of India, was not a delivery order. The Second Appeal was preferred before the Maharashtra Sales Tax Tribunal, which allowed the Appeal and referred the questions of law to this Court.

IV.The Sales Tax Reference No.12 of 2000.

11. In the Commissioner of Sales Tax v. M/s.G.Rasul & Company case, the Respondent is a dealer duly registered under Bombay Sales Tax Act as well as under the Central Act. The Respondent’s business is of import and sale of goods. During the period of assessment year 1984-85, the Assessment Officer allowed

the claim of Rs.12,27,198/-as sales in the course of imports covered by Section 5(2) of the Central Act read with Section 75 of the Bombay Act.

12. Under the Bombay Act, the assessment was resulted in demand for Rs.4/- only; while under the Central Act, it was assessed at Rs.3,750/- which was found to have been paid with returns. But since the payment was made late, penalty under section 9(2A) of the Central Act read with Section 36(3) of the Bombay Act was levied at Rs.28.

13. The Assessment records were scrutinised by the learned Deputy Commissioner of Sales Tax (Administration), III, Bombay City Division, Bombay, wherein, he found that the assessment to be improper as the sales made by the endorsement by way of Airway Bills could not be allowed to be exempted under section 5(2) of the Central Act. The Deputy Commissioner also proposes to levy penalty under section 9(2A) of the Central Act read with Section 36(2)(c) of the Bombay Sales Tax Act. After this, the Deputy Commissioner passed the impugned orders raising demands at Rs.42,824/- and Rs.29,498/- under the Bombay Act and the Central Act respectively.

14. Aggrieved thereby, the Respondent had preferred an Appeal to the Maharashtra Sales Tax Tribunal which has set aside the entire order of Deputy Commissioner of Sales Tax and reduced the penalty under section 9(2A) of the Central Act read with Section 36((2)(c) of the Bombay Act from Rs.14,749/- to Rs.1,000/-.

V. The Sales Tax Reference No.8 of 2001.

15. In the Commissioner of Sales Tax v. Ashapura Minechem Private Limited case, the Respondent M/s. Ashapura Minechem Private Limited are a registered dealers under the Act and Central Act. They are importers and exporters in chemical, electronics and electrical goods. The Respondents were assessed for the period 1st July, 1986 to 30th June, 1987 and they made claim of sales during the course of imports under section 5(2) of the Central Act and claim exemption. However, the Sales Tax Officer disallowed the claim in respect of invoice no.19 dated 9th April, 1987 amounting to Rs.41,534/-pertaining to the import of goods by air. These goods were allegedly sold to Oriental Colour Laboratories (Purchasing Dealers). The Respondent opened the Letter of Credit with the bankers for the

import of goods on 28th February, 1987. The Delivery Order was issued by bankers endorsed in favour of the Purchasing Dealer, Oriental Colour Laboratory, by the Respondent. The Purchasing Dealer on 28th February, 1987 entered Bill of Entry for home consumption. On 27th February, 1987, the Respondent cleared the goods from Customs at the Air port after the payment of customs duties.

16. Order of the disallowance of Sales Tax in the course of import under section 5(2) of the Central Act was confirmed by the Commissioner of Sales Tax (Appeals). Thereafter, the Respondents filed Second Appeal before the Maharashtra Sales Tax Tribunal, which, held that the Delivery Order issued by the Bank in favour of the Respondent is a document of title to the goods which they had inturn endorsed in favour of their buyers where the goods have crossed the customs frontiers of India.

17. Shri Naphade, the learned senior counsel appearing on behalf of the Applicant/State sought to contend that "Airway Bill" is a document of title and the letter issued by the Bank is not a document of title. His main contention is Airway Bill ought to be construed as document of title in the facts and

circumstances of all the above cases, he referred to various English judgments in their above Appeals, mainly on **Alicia Hosiery, Ltd. v. Brown Shipley & Co.,Ltd. And Another on 1969 volume II AELR Page 504.** Another judgment of King's Bench Division in **Laurie and Morewood v.Dudin And Sons 1926 Volume I King's Bench** Division Page 223. Another judgment of Queens Bench Division in the **Cremer and others v. General Carriers SA** (1974) 1 All ER. Then a judgment of Privy Council, Ramdas Vithaldas Durbar v. S.Amerchand & Co. AIR 1916 Page 7.

18. Shri Naphade took us through various provisions of carriage by Air Act, 1972 to contend that Airway Bill is really a "document of title".In this context, we may note here that both the above questions referred to us by way of Reference do not at all state whether Airway Bill was a document of title and the said issue not been referred to us at all. Over and above, on a perusal of Sales Tax Reference No.14 of 1995, the Tribunal in its order dated 7th January, 1992, the Tribunal has categorically stated in paragraph 16 as under:

> " I am not call upon, in this case, to adjudicate as to whether the Airway bill is a document of title or not"

From the above, it is apparent that whether the Airway Bill is a document of title is not even an issue raised or not even considered and no finding has been given on the same. Over and above, such an issue has not been referred to this Court, hence, there is no question of deciding the same.

19. Shri Surte, the learned counsel appearing on behalf of the Respondent Crystaline Corporation in Sales Tax Reference No.4 of 2000, very strongly contended under the facts and circumstances of the cases as we had enumerated hereinabove, Delivery Order would clearly be a document of title. He strongly relied on the judgment of the Supreme Court in **Bayyana Bhimayya and another v. Government of Andhra Pradesh AIR 1961 S.C. 1065** wherein the Supreme Court has clearly observed as under:

> "A Delivery order is a document of title to goods and the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery."

Thereafter, the learned counsel Shri Surte brought to

our notice another judgment of the Supreme Court in **Chhaganlal Savchand v. Commissioner of Income-tax, Bombay 1966 (Volume 61 STR, 133 (Bombay)** wherein the Division Bench has clearly held as under:

> "It would be clear that in India, the bill of lading in the commercial world is used in the ordinary course of business as proof of possession or control of the goods themselves, and the possessor of the Bill of lading is taken in the commercial world as a person authorised to transfer these goods either by making an endorsement on the bill of lading or even by mere delivery of the bill of lading with the endorsement on the bill of lading. Thus, having regard to the provisions of sub section (4) of section 2, can not be said to be necessarily a condition precedent for the transfer of goods".

Thereafter, Shri Surte referred to the judgment of the Supreme Court in the **J.V.Gokal & Company (Private) Limited v. The Assistant Collector of Sales Tax (Inspection) Volume XI STC 186 (SC).** In the above, the Supreme Court, after an exhaustive analysis of "sale during the course of import and sale during the course

of export" had held as under:

> "The legal position vis-a-vis the import-sale can be summarized thus:(1) The course of import of goods starts at a point when the goods cross the customs barrier of the foreign country and ends at a point in the importing country after the goods cross the customs barrier; (2) the sale which occasions the import is a sale in the course of import; (3) a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import, and (4) a sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import".

20. Shri Surte then pointed out another judgment of Supreme Court in **Minerals & Metals Trading Corporation of India Ltd. v. Sales Tax Officer 111 STC 434 (SC).** The Supreme Court has categorically held that

the bill of lading had been endorsed in favour of the SAIL while the consignment was still upon the high seas and the sale was in the course of import into the territory of India;it was effected by transfer of documents to the goods before they had crossed the limits of the customs station at Paradeep Port, which was a customs port. Accordingly, the Supreme Court held that the sale was exempted from sales tax in view of the Section 5(2) read with section 2(ab) of the Central Act.

21. Shri Surte thereafter brought to our notice judgment of the Supreme Court in **Ramalingam and Company v. the state of Madras Volume XIII STC page 335** wherein the Supreme Court has held

> "The relation between the buyer and his issuing banker was not of principal and agent, nor was the relation between the issuing banker and the intermediary banker is that of principal and agent. The two bankers were interposed for the protection of the seller as well as the buyer. The issuing banker did not purport to act as agent of the buyer and the intermediary banker accepted the general offer of the issuing banker by

> negotiating the draft. By so accepting the offer and by taking over the bill of lading, the insurance certificate and the invoice which represented title to the goods the intermediary banker did not act as an agent of the seller."

22. Shri Surte contended that not only sale but even agreement to sell if takes place on the high sea, the same would also be covered. In the case of **State of Maharashtra v. Embee Corporation, STC Volume 107 Page** 196 wherein the Supreme Court has held as under:-

> "The above definition of "sale" in the Act shows that the word "sale" has been given a very wide meaning so as to include not only the sale of goods, but also the transactions, namely, a transfer of goods on hire purchase system. Further, the use of words "sale of goods" in section 3 of the Act and the words "contract of sale" occurring in section 4(2) of the Act have been assigned the same meaning which is wider to the meaning of sale

in the general law. In such a situation the word "sale" defined in section 2(g) of the Act and employed in section 3 and other sections of the Act would embrace not only completed contract, but also the contract of sale or agreement of sale if such contract of sale or agreement of sale provides for movement of goods or movement of goods is incident of the contract of sale. This matter may be examined from another angle. An agreement to transfer goods to the buyer for a price is an important element of sale and the same is also borne out from section 4 of the Sale of goods Act. If section 4 of the Sale of Goods act is read alongwith sections 3 and 4 of the Act, it would mean an agreement to sell would also be a sale within the meaning of sale provided such agreement of sale stipulates for transfer or movement of goods or movement of goods is incident of the contract of sale and in that case, such movement of goods would be deemed to be occasioned by the sale. It is immaterial that actual sale does not take place at the time of movement of goods and takes place later on. This interpretation of section

> 3(a) of the Act if applied to sub-section (2) of section 5 of the Act, would mean that if an agreement for sale stipulates import of goods or import of goods is incident of contract of sale and goods have entered the import stream, such import would fall within the expression "sale occasions import". In the present case, the import of carbamite is direct result of the contract of sale and as such it can be safely held in the present case that sale has occasioned the import".

23. Under the aforesaid facts and circumstances, and in view of the above exposition of law, Shri Surte, the learned counsel appearing on behalf of the Respondent, contended that both the questions referred to hereinabove should be answered in affirmative, i.e., in favour of the assessee and against the Revenue.

24. Mrs.Badeka, the learned counsel who appeared in Sales Tax Reference No.8 of 2001 on behalf of the Messers Ashapura Minechem Private Limited wholly adopted the arguments of Shri Surte and reiterated and contended that even in the case of her client, it is explicitly clear that all the documents tendered when the sale had taken place before the goods had crossed the customs

frontiers of India and as such, the Respondents are entitled to be exempted under section 5(2) of the Sales Tax Act. The learned counsel also referred to all the aforesaid judgments relied upon by Shri Surte. Over and above, Mrs.Badeka also pointed out the judgment of West Bengal Tax Tribunal in the case of **Satyanarayan Bagla v. Commissioner of Commercial Taxes, West Bengal and Others (1992) 084 STC 0368.** In the said order, the Tribunal has held that

> "A delivery order is a document of title to goods and the possessor of such document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. Mere transfer of pucca delivery orders does not amount to sale; it is only when the ultimate endorsee in the chain of transactions takes delivery of the goods that all the intermediate transactions fructify to sales and the ultimate delivery feeds back the title of the intermediate dealers. The question of delivery having been effected is of paramount importance to a decision regarding taxability in a transaction governed by pucca delivery orders.

25. Mrs. Badeka also brought to our notice the judgment of Supreme Court in **Bayyana Bhimayya & Sukhdev Rathi v. Government of Andhra Pradesh** which has referred to hereinabove have been followed by the Supreme Court in **State of Andhra Pradesh v. Kollasree Ramamurthy 1962 (13 STC 522) (SC).**

26. After considering all the submissions of the learned counsels for the Applicants as well as the Respondents, we are clearly of the view that as issue with regard to the Airway bill was neither referred to us nor was considered and no finding has been given. Under these circumstances, we are not dealing with the said arguments raised by Shri Naphade on behalf of the Applicant. As far as both the questions referred by the Tribunal's order, the Sales Tax Tribunal has clearly given findings based on the existing documentary evidence that the sale had taken place before the goods had crossed customs frontiers of India and as such, entitled to exemption under section 5(2) of the Central Act as the same was a sale during the course of import.

27. In view of the aforesaid judgments of the Supreme Court quoted hereinabove we are clearly of the view that the Tribunal was absolutely right in holding that the sale had taken place during the course of

import and as such, sale was exempted from sales tax. As far as the Delivery Order is concerned, the same was also conclusively decided by the judgments of the Supreme Court, holding that such Delivery Orders amount to a document of title. Under the aforesaid facts and circumstances, we answer both the questions nos.1 and 2 in the affirmative, i.e., in favour of the Assessee and against the Revenue. All the aforesaid Sales Tax References stand disposed of accordingly. However, with no order as to costs.

(DR.S.RADHAKRISHNAN,J.)

(J.H.BHATIA, J.)